

Department of Energy

Pt. 719, App.

or serve as lead counsel, when the rights of the contractors and the government can be effectively represented by a single legal counsel, consistent with the standards for professional conduct applicable in the particular matter. Contractors may propose to the General Counsel their preference for the individual or law firm to perform as the lead counsel for a particular matter.

(b) If a contractor, having been afforded an opportunity to present its views concerning joint or lead representation, does not acquiesce in the designation of one retained legal counsel to represent a number of contractors, or serve as lead counsel, then the legal costs of such contractor are not reimbursable by the Department, unless the contractor persuasively shows that it was reasonable for the contractor to incur such expenses.

Subpart E—Department Counsel Requirements

§ 719.40 What is the role of Department counsel as a contracting officer's representative?

(a) The individual selected as Department counsel for a contract subject to the requirements of this part must be approved by the contracting officer and the appropriate Chief Counsel, or General Counsel if at Headquarters. The Department counsel must receive written delegated authority from the contracting officer to serve as the contracting officer's representative for legal matters. The contractor must receive a copy of this delegation of authority.

(b) Actions by Department counsel may not exceed the responsibilities and limitations as delegated by the contracting officer. Delegated contracting officer representative authority may not be construed to include the authority to execute or to agree to any modification of the contract nor to attempt to resolve any contract dispute concerning a question of fact arising under the contract.

§ 719.41 What information must be forwarded to the General Counsel's Office concerning contractor submissions to Department counsel under this part?

Department counsel must submit through the General Counsel reporting system, the approved costs and status updates for all matters involving retained counsel, including but not limited to contractor litigation. The reports are to be received by the 15th day of the month following the end of each quarter of the fiscal year.

§ 719.42 What types of field actions must be coordinated with Headquarters?

(a) Requests from contractors for exception from this entire part must be coordinated with Headquarters.

(b) Requests from contractors for approval to initiate or defend litigation, or to appeal from adverse decisions, where legal issues of first impression, sensitive issues, issues of significance to the Department nationwide or issues of broad applicability to the Government that might adversely impact its operations are involved must be coordinated by Department counsel with the Deputy General Counsel for Litigation or his/her designee.

(c) Department field counsel must inform the General Counsel of any significant matter, as defined in this part, and must coordinate any action involving a significant matter with the General Counsel, or his/her designee, as directed by the General Counsel or his/her designee.

APPENDIX TO PART 719—GUIDANCE FOR LEGAL RESOURCE MANAGEMENT

Management and Administration of Outside Legal Services

- 1.0 Initiation of Litigation
- 2.0 Defense of Litigation
- 2.1 Disapproval of Defensive Litigation
- 3.0 Notice to the Department of Significant Matters and Litigation
- 4.0 Alternative Dispute Resolution
- 5.0 Cost Allowability Issues
- 5.1 Underlying Cause for Incurrence of Costs
- 5.2 Fees and Other Charges
- 6.0 Role of Department Counsel as the Contracting Officer's Representative

7.0 Future Amendments to Guidance
Attachment—Contractor Litigation and
Legal Costs, Model Bill Certification and
Format

*Management and Administration of Outside
Legal Services*

This guidance is intended to assist contractors and the Department's contracting officers and counsel in managing the costs of outside legal services. This guidance is also intended to assist retained legal counsel who provide services to the Department or to the Department's contractors.

1.0 Initiation of Litigation

(A) The Insurance—Litigation and Claims clause (48 CFR (DEAR) 970.5228–1) in the Department's facility management contracts provides that the contractor may not initiate litigation, including appeals from adverse decisions, without the prior authorization or approval of Department counsel acting in his/her capacity as the Department's contracting officer representative. The following are the minimum informational requirements for requests for authorization or approval under that clause:

- (1) Identification of the proposed parties;
- (2) The nature of the proposed action;
- (3) Relief sought;
- (4) Venue;
- (5) Proposed representation and reason for selection;
- (6) An analysis of the issues and the likelihood of success, and any time limitation associated with the requested approval;
- (7) The estimated costs associated with the proposed action, including whether outside counsel has agreed to a contingent fee arrangement;
- (8) Whether, for any reason, the contractor will assume any part of the costs of the action;
- (9) A description of any attempts to resolve the issues that would be the subject of the litigation, such as through mediation or other means of alternative dispute resolution; and
- (10) A discussion of why initiating litigation would prove beneficial to the contractor and to the Government.

(B) Department counsel should advise the contracting officer concerning each request and must provide assistance to the contracting officer in communicating the Department's decision to the contractor.

2.0 Defense of Litigation

(A) In accordance with the Insurance-Litigation and Claims clause, the contractor must immediately notify Department counsel, acting in his/her capacity as contracting officer representative, of the initiation of litigation against the contractor. Depart-

ment counsel will advise the contractor as to:

- (1) Whether the defense of the litigation will be either approved or disapproved or approval deferred and any conditions to which approval is subject;
- (2) Whether the contractor must authorize the Government to defend the action;
- (3) Whether the Government will take charge of the action; or
- (4) Whether the Government must receive an assignment of the contractor's rights.

(B) When defensive litigation is approved at a later stage or at the conclusion of the matter, reimbursement can be made for only those expenses which would have been reimbursable as allowable costs if the Department had originally approved the defense of the litigation.

2.1 Disapproval of Defensive Litigation

If the Department disapproves in advance the costs of defense of the litigation, the contractor will be notified of the disapproval and that contract funds may not be used to fund the defense of the litigation. The contractor will also be informed if the Department changes its position. Contractor compliance with these policies and procedures does not itself obligate the Department to reimburse litigation costs or judgment costs when Departmental approval of the litigation cost has been denied or deferred.

*3.0 Notice to the Department of Significant
Matters and Litigation*

The contractor's procedures under its Legal Management Plan should include provisions for earliest possible notification to the Department of the likely initiation of any "significant matters" involving class actions, radiation or toxic substance exposure, problems concerning the safeguarding of classified information, and any other matters involving issues which the contractor has reason to believe are of general importance to the Department or the government as a whole.

4.0 Alternative Dispute Resolution

Contractors are expected to evaluate all matters for appropriate alternative dispute resolution (ADR) at various stages of an issue in dispute, *e.g.*, before a case is filed, pre-discovery, after initial discovery and pre-trial. This evaluation should be done in coordination with the Department's ADR liaison if one has been established or appointed or the Department counsel if an ADR liaison has not been appointed. Contractors, contractor counsel, and Department counsel are also encouraged to consult with the Department's Director of the Office of Dispute Resolution. The Department anticipates that mediation will be the principal

and most common method of alternative dispute resolution. In exceptional circumstances, arbitration may be appropriate. However, agreement to arbitrate should generally be consistent with the Administrative Dispute Resolution Act (incorporated in part at 5 U.S.C. 571, *et seq.*) and Department guidance issued under that Act. When a decision to arbitrate is made, a statement fixing the maximum award amount should be agreed to in advance by the participants.

5.0 Cost Allowability Issues

A determination of cost reasonableness may depend on a variety of considerations and circumstances. In accordance with 48 CFR (FAR) 31.201-3, no presumption of reasonableness is attached to the incurrence of costs by a contractor. 10 CFR part 719 and this Appendix provide contractors guidelines for incurring legal costs to which adherence should result in a determination of allowability if the cost is otherwise allowable under the contract.

5.1 Underlying Cause for Incurrence of Costs

(A) While 10 CFR part 719 provides procedures for incurring legal costs, the determination of the reason for the incurrence of the legal costs, *e.g.*, liability, fault or avoidability, is a separate determination. This latter determination may involve, for example, a possible finding of willful misconduct or lack of good faith by contractor management in the case of third party liability, or a finding of violation of a statute or regulation by the contractor in a governmental proceeding. The reason for the contractor incurring costs may be determinative of the allowability of the contractor's legal costs. For example, legal costs incurred by a contractor in defending actions brought by governmental agency may be covered by the Major Fraud Act, 41 U.S.C. 256(k), implemented as a cost principle at 48 CFR (FAR) 31.205-47. In such cases, the statute may restrict the Department's authority to reimburse legal costs incurred by the contractor regardless of the outcome of the action.

(B) In some cases, the final determination of allowability of legal costs cannot be made until a matter is fully resolved. This is particularly true in the case of legal defense costs covered by the restrictions in the Major Fraud Act and is also a common problem in cases covered by various whistleblower statutes and regulations. In certain circumstances, contract and cost principle language may permit conditional reimbursement of costs pending the outcome of the legal matter. Whether the Department makes conditional reimbursements or withholds any payment pending the outcome, legal costs ultimately reimbursed by the Department must satisfy the standards of cost reasonableness.

5.2 Fees and Other Charges

(A) Requests by retained legal counsel that are not in a direct contract with the Department for fee increases should be sent in writing to the contractor, who should review the request for reasonableness. If the contractor determines the request is reasonable, the contractor should seek approval for the request from Department counsel and the contracting officer before it authorizes any increase. Contractors should attempt to lock in rates for partners, associates and paralegals for at least a two-year period.

(B) Costs listed in 10 CFR 719.33(c) are usually incorporated into the rate or fee structure. Consultants or experts hired by retained legal counsel who do not include any overhead or similar charges, such as computer time, in their base rate, must have those charges approved in advance by Department counsel and the contracting officer. Time charged by law students should be scrutinized for its efficiency and have prior authorization.

(C) Travel time may be reimbursed at a full rate for the portion of time during which retained legal counsel actually performs work for which it was retained; any remaining travel time during normal working hours shall be reimbursed at 50 percent, except that in no event is travel time for time during which work was performed for other clients reimbursable. Also, for long distance travel that could be completed by various methods of transportation, *i.e.*, car, train, or plane, only the charge for the overall fastest travel time will be considered reasonable.

(D) For costs associated with the creation and use of computerized databases, contractors and retained legal counsel must ensure that the creation and use of computerized databases is necessary and cost-effective. Potential use of databases originally created by the Department or its contractors for other purposes, but that can be used to assist a contractor or retained legal counsel in connection with a particular matter, should be considered and be coordinated with Department counsel.

6.0 Role of Department Counsel as the Contracting Officer's Representative

(A) An attorney from the field office or from Headquarters will be appointed a contracting officer's representative by the cognizant contracting officer. A contracting officer may designate other Government personnel to act as authorized representatives for functions not involving a change in the scope, price, terms or conditions of the contract. This designation is made in writing and contains specific instructions regarding the extent to which the representatives may take action for the contracting officer, and prohibits the representative from signing

contractual documents. The contracting officer is the only person authorized to approve changes in any of the requirements under the contract.

(B) Additional discussion of the authority and limitation of contracting officers can be found at 48 CFR (FAR) 1.602–1, and for contracting officer's representatives at 48 CFR (DEAR) 942.270–1. The clause, Technical Direction, 48 CFR (DEAR) 952.242–70, also discusses the responsibilities and limitations of a contracting officer's representative.

7.0 Future Amendments to Guidance

The Office of the General Counsel may by memorandum provide additional guidance to contractors. These memoranda will serve as guidance for “safe harbor” practices for contractors procuring outside legal services.

ATTACHMENT—CONTRACTOR LITIGATION AND LEGAL COSTS, MODEL BILL CERTIFICATION AND FORMAT

1. Certification

Bills or invoices should contain a certification signed by a representative of the retained legal counsel to the effect that:

“Under penalty of law, [the representative] acknowledges the expectation that the bill will be paid by the contractor and that the contractor will be reimbursed by the Federal Government through the U.S. Department of Energy, and, based on personal knowledge and a good faith belief, certifies that the bill is truthful and accurate, and that the services and charges set forth herein comply with the terms of engagement and the policies set forth in the Department of Energy's regulation and guidance on contractor legal management requirements, and that the costs and charges set forth herein are necessary.”

2. Model Bill Format

I—FOR FEES

Date of service	Description of service	Name or initials of attorney	Approved rate	Time charged	Amount (rate × time)
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(See Note 1 to this table).

II—FOR DISBURSEMENTS

Date	Description of disbursement	Amount
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(See Note 2 to this table).

NOTE 1—DESCRIPTION OF SERVICE: All fees must be itemized and described in sufficient detail and specificity to reflect the purpose and nature of the work performed (*e.g.*, subject matter researched or discussed; names of participants of calls/meetings; type of documents reviewed).

NOTE 2—DESCRIPTION OF DISBURSEMENT: Description should be in sufficient detail to determine that the disbursement expense was in accordance with all applicable Department policies on reimbursement of contractor legal costs and the terms of engagement between the contractor and the retained legal counsel. The date the expense was incurred or disbursed should be listed rather than the date the expense was processed. The following should be itemized: copy charge (*i.e.*, number of pages times a maximum of 10 cents per page); fax charges (date, phone number and actual amount); overnight delivery (date and amount); electronic research (date and amount); extraordinary postage (*i.e.*, bulk or certified mail); court reporters; expert witness fees; filing fees;

outside copying or binding charges; temporary help (assuming prior approval).

NOTE 3—RECEIPTS: Receipts for all expenses equal to or above \$75 must be attached.

PART 725—PERMITS FOR ACCESS TO RESTRICTED DATA

GENERAL PROVISIONS

Sec.

- 725.1 Purpose.
- 725.2 Applicability.
- 725.3 Definitions.
- 725.4 Interpretations.
- 725.5 Communications.
- 725.6 Categories of available information.
- 725.7 Specific waivers.

APPLICATIONS

- 725.11 Applications.
- 725.12 Noneligibility.
- 725.13 Additional information.
- 725.14 Public inspection of applications.